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No. 91-405

In The

Supreme Court of the United States

CITY OF JERSEY CITY, a political subdivision, JERSEY CITY POLICE DEPARTMENT, and RICHARD HARRISON and WALTER ADAMS, Directors of the Jersey City Police Dept.,

Petitioners,

vs.

MICHAEL J. REDFIELD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Court of Appeals properly affirmed the district court judgment in favor of respondent.

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No. 91-405

In The

Supreme Court of the United States

October Term, 1991

CITY OF JERSEY CITY, a political subdivision, JERSEY CITY POLICE DEPARTMENT, and RICHARD HARRISON and WALTER ADAMS, Directors of the Jersey City Police Departments,

Petitioners,

vs.

MICHAEL J. REDFIELD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The respondent Michael Redfield respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the Court of Appeals judgment order (Pet. App. 1a-2a).

OPINIONS BELOW

The unreported opinions and orders below are reproduced at petitioners' appendices A, B, C, D, and E.[1]

STATEMENT OF JURISDICTION

The judgment order of the Court of Appeals for the Third Circuit was entered on June 4, 1991 (Pet. App. 1a-2a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1). The judgment of the district court was entered only against the City of Jersey City and accordingly the City of Jersey City is the only proper petitioner (Pet. App. 43a-44a).

STATUTES INVOLVED

The statutes involved are 42 U.S.C. § 1983 (Pet. 2) and N.J.S.A. 40A:14-147 (Pet. 3-4), which are reproduced in the petition for a writ of certiorari.

STATEMENT OF THE CASE

On October 7, 1984, respondent Michael Redfield, a Jersey City Police Detective, while in uniform, on off-duty detail, provided security for Foxes, a night club in Jersey City, New Jersey. That night, a fellow Jersey City Police Officer, Kenneth Bolhardt, while off-duty and a patron at Foxes, was involved in a fight at the club. Bolhardt accused Redfield of failing to come to his aid and of being derelict in his duties for refusing to arrest the other combatants. On October 9, 1984, while Redfield was on vacation, Jersey City Police Director Richard Harrison

---

1. This January 23, 1989 opinion as reproduced by petitioners in Appendix C, at page 21a, second paragraph, contains a typographical error. Respondent joined the Jersey City Police Department in April 1970, not April 1979.

determined Redfield was neglectful in his duties as a result of this accusation and summarily demoted and reassigned respondent from detective to patrolman, reduced his salary, and transferred him to a new precinct which prevented any off-duty work at the night club. Redfield was stripped of his gold shield and reissued a silver one. No charges were filed (Pet. App. 46a).

Respondent was not afforded a hearing to explain the events of October 7, 1984, and he was denied any explanation for the job change. Respondent was ostracized and branded a coward by fellow officers (Pet. App. 46a).

Respondent filed a complaint in the United States District Court for the District of New Jersey, Civ. No. 86-3869, which was allocated to Honorable H. Lee Sarokin, U.S.D.J., against the City of Jersey City, the Jersey City Police Department, Police Director Harrison and his successor, Walter Adams, claiming, *inter alia*, that the demotion deprived respondent of property rights without due process contrary to 42 U.S.C. § 1983 ("Section 1983"), and state law, custom and practice, and local rules and regulations (Pet. App. 46a-47a). Respondent claimed that, having been promoted to detective in 1980 with an increase in salary and issuance of a gold detective badge, his was a different rank or position than patrolman (Pet. App. 70a). As a permanent member of the Jersey City police force, he could not and should not have been demoted to patrolman for disciplinary reasons until he was afforded due process in the form of written charges and a hearing (Pet. App. 47a-48a). Petitioners denied that respondent was disciplined and demoted and contended he was merely reassigned. At trial, petitioners contended that this was a reassignment in lieu of discipline.

By opinion and order filed July 29, 1988, the district court granted summary judgment in favor of respondent on his due process claim (Pet. App. 3a-19a).

By opinion and order filed January 23, 1989 (Pet. App. 20a-42a), the district court reconsidered and vacated the prior order and opinion of July 29, 1988. The claims against Harrison and Adams were dismissed on the basis of qualified immunity. The district judge determined that the issue of mutual understanding as to respondent's permanent appointment to detective presented a genuine factual issue (Pet. App. 31a).

The Court stated:

> The court concludes that plaintiff should be allowed to establish at trial that, based upon custom and practice, as well as existing regulations and agreements, those appointed as detectives in the Jersey City Police Department considered the designation to be a promotion carrying with it certain benefits, prestige and expectations. Among those expectations may have been the understanding that loss of the designation of detective for purported disciplinary purposes would entitle the individual involved to a hearing. It does not necessarily follow that all rights and benefits to which the plaintiff would be entitled under a recognized civil service classification necessarily must be accorded to plaintiff. His property right may be sufficient, however, to require a hearing before he can be deprived of it.
>
> The characterization of the personnel action as a "promotion" or "reassignment" is not dispositive. The designation may have conferred a property right, by reason of the conduct of the employer. Withdrawal or reduction of that right may entitle the respondent to a hearing where the alleged basis is some misconduct on the part of the employee.

(Pet. App. 37a-38a).

The matter was tried in July 1990 before a jury for eight days.

At the conclusion of the testimony, the court, with input and approval of both counsel, prepared an overview of the case and outline of the issues which supplemented the jury charge.

> In essence, the plaintiff claims that he was promoted to detective from patrolman. That the detective department is a separate rank or position, requiring a hearing before he could be demoted or disciplined.
>
> The Defendant, on the other hand, contends that the detective department is not a separate rank or position. That the plaintiff was subject to reassignment as a patrolman at any time, without the necessity of giving him a hearing. That is basically the issue in this case. So you will have to decide first, that issue.
>
> Then you will have to decide whether or not the action taken by the city, against the plaintiff, constituted discipline of him and whether under all of the circumstances, he was or was not even entitled to a hearing.
>
> Finally, if you decide he was entitled to a hearing and there is no suggestion that he received one, whether denial caused him damage and if so what those damages are. So, basically, these are the issues that you will have to decide. . . .

(Resp. App. 1a-2a).

Petitioners failed to make a motion for directed verdict at the end of the case. The district court fully charged all elements of a Section 1983 claim. Petitioners refused to consent to interrogatories to be submitted to the jury. The jury returned a general verdict in favor of respondent (Pet. App. 68a). Petitioners' motion for judgment notwithstanding the verdict (n.o.v.) was denied (Pet. App. 45a-54a). The district court entered judgment in favor of respondent on October 24, 1990 (Pet. App. 43a-44a).

The petitioners appealed pursuant to 28 U.S.C. § 1291. Oral argument was held on May 15, 1991, before Hons. William D. Hutchinson, Leonard Garth, and Robert Cowen, Circuit Judges, and the Court of Appeals, by judgment order filed June 4, 1991, affirmed (Pet. App. 1a-2a). Pursuant to the Internal Operating Procedures for the Third Circuit, 6.1, 6.2 (July 1990), a judgment order is appropriate where the panel unanimously determines that there was no error below (Resp. App. 2a-3a).

Respondent respectfully submits that petitioners have not shown any conflicts below or any other special and important reasons to grant the writ.

REASONS FOR DENYING THE WRIT

Respondent submits that the writ should be denied for the following reasons:

1. *The district court properly instructed the jury regarding the elements of a Section 1983 cause of action.* Petitioners distort the trial judge's decision not to tell the jury regarding the January 23, 1989 opinion (Pet. 8; Pet. App. 65a-66a).

The trial judge declined to charge that respondent could not rely upon civil service law to establish a property right and decided instead to tell the jury the elements of the Section 1983 claim which respondent must establish (Pet. App. 66a). There is no requirement that a Section 1983 property right be based on state civil service classifications (Pet. App. 37a-38a). This is consistent with the trial judge's opinion and order of January 23, 1989 (Pet. App. 20a-42a). Petitioners did not appeal this order (Resp. App. 11a-12a).

The court accepted petitioners' requests to charge on the issues of custom and practice of the Jersey City Police Department; and whether a "detective" was a separate rank from "patrolman" (Resp. App. 4a). The court also accepted petitioners' request to charge, pursuant to *Mt. Healthy City School Dist. Bd. of Ed. v. Doyle,* 429 U.S. 274 (1977), the "but for" test, that if the results would have been the same even if respondent had been given a hearing, then the jury could award only nominal damages (Resp. App. 5a). These issues raise factual questions for a jury to resolve.

Petitioners objected to that portion of the instruction dealing with N.J.S.A. 40A:14-147 contending that the court's January 23, 1989 ruling declared respondent had no permanent position as a detective (Resp. App. 6a-9a). The court rejected petitioners' contention, and stated as follows:

> Just so there is no question about what the Court's view was, the Court found that under civil service there was no position as detective. We have a fact issue now as to whether under the actions taken by Jersey City, they recognized that detective was a separate rank or position and if they do, then they have a right to consider the state law as to what procedures had to be followed in order to remove him from that position, and this statute is some evidence of that, and so I am going to charge that over the [petitioner's] objection.

(Resp. App. 9a).

Petitioners have shown merely dissatisfaction with the jury verdict and opinions below without establishing a basis for granting the writ of certiorari.

2. *The district court judgment is sufficiently supported by the evidence.* This Court's prior decisions and the Third Circuit cases are controlling as a matter of law and there are no conflicts between the circuit court decisions and this Court's decisions. *See Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 577 (1972); *Perry v. Sinderman,* 408 U.S. 593 (1972); *Logan v. Zimmermann Brush Co.,* 455 U.S. 422, 430 (1982); *Memphis Light Gas and Water Division v. Craft,* 436 U.S. 1, 9 (1978); *see also, Clark v. Township of Falls,* 890 F.2d 611, 617 (3rd Cir. 1989); and *Stanna v. School District of Pittsburgh,* 775 F.2d 122 (3rd Cir. 1985). These cases set forth that state common and statutory law govern whether a property right exists and that the sources of the right include course of dealings, mutual understandings, collective bargaining agreements, and local rules and regulations. Respondent proved the existence of his property right and the deprivation thereof under each category. This was specifically found by the trial judge in his denial of the motion n.o.v. (Pet.

App. 50a). There are no decisions cited by petitioners on questions of federal law in conflict with the district court opinion denying the motion n.o.v. and the Third Circuit affirmance. Petitioners seek to use the petition for a writ of certiorari to alter the findings of the jury and the district court on factual matters and, accordingly, the writ should be denied.

3. *Petitioners' argument that New Jersey state law does not support respondent's claims misstates the relevant law.* Petitioners purport to show a conflict between the district court opinion denying the motion n.o.v. and *Woolley v. Hoffmann-LaRoche, Inc.*, 99 N.J. 284, 491 A.2d 1257, *mod.*, 101 N.J. 10, 499 A.2d 515 (1985) and *Ware v. Prudential Ins Co.*, 220 N.J. Super. 135, 531 A.2d 757 (App. Div. 1987), *certif. denied*, 113 N.J. 335, 550 A.2d 450 (1988) and to argue a distinction between private, non-collective, and public, collective bargaining employment. By the very nature of the "color of law" requirement, Section 1983 employment cases involve public employment.

Petitioners, however, did not cite these two cases to either the district court, pre-trial, or on the motion n.o.v. or to the Third Circuit or argue this point to either court. In any event, these two cases do not conflict with the trial court's decision. In the case at bar, both the collective bargaining agreement and the Jersey City Police Department rules and regulations substantiate respondent's claim that he was entitled to written charges and a hearing before being disciplined and demoted. *See* Rule 723, (Pet. 5) and Agreement between City of Jersey City and Jersey City police officers Benevolent Association, Article IV, "Retention of Civil Rights" (Pet. App. 80a), and Article XXXVIII, "Discharge and Discipline", Sections 3 and 8 (Pet. App. 115a-116a).

The trial court relied upon *Woolley, supra,* not to establish the contours of the federal law on Section 1983 claims, but to

cite the state common law principle that an implied contract ma be binding (Pet. App. 50a).

Further, petitioners' counsel agreed to the specific jury charg that "It is clear that under the law, a course of dealing may resu in an implied contract. The course of dealing would include th length of service, whether there was an increase in salary, an whether there were other indicia of the rank and position whic give rise to the expectation that said rank or position woul continue" (Resp. App. 10a). *See Bishop v. Wood,* 426 U.S. 341 344 (1976). This is consistent with prior decisions of this Court *See Board of Regents of State Colleges v. Roth, supra;* and *Perr v. Sinderman, supra.*

4. *The district court correctly instructed the jury on stat law.* Petitioners' argument that the Third Circuit erred is flawed Petitioners take the trial judge's statements out of context an petitioners fail to cite any authority that state civil service la is the exclusive basis to establish property rights in a Section 198 context.

Petitioners rely upon the trial judge's statement in the charg conference that "If we ever said it to the jury, the case woul be over" (Pet. 12) to support the exclusivity argument. Tha reliance is misplaced. The trial judge continued to state "tha is the finding that it [detective] is not a civil service designatio but that is why we are here" (Pet. App. 65a). Petitioners' argumen would preclude any detective from establishing a Section 198 claim, notwithstanding custom and practices and mutua understandings, simply because there is no civil service categor of "detective". Petitioners offer no authority for so limitin Section 1983 claims. This position is contrary to this Court' decisions.

The district judge earlier ruled (Pet. App. 49a) that responden

was entitled to show a property interest under the Supreme Court and Third Circuit case law because state civil service law does not claim exclusivity or otherwise prohibit granting a hearing:

> However, state law does not prohibit granting a hearing to such persons if local practice has created such an entitlement based on the benefits entitled by such designation.

(Pet. App. 38a).

New Jersey law recognizes that the civil service statutory scheme must be read *in pari materia* with the statutes providing for hearings for police officers (N.J.S.A. 40:47-6, which is the source statute for N.J.S.A. 40A:14-147) because the civil service act "does not purport to deprive aggrieved employees of judicial relief". *Perrapato v. Rose,* 83 N.J. Super. 245, 249, 199 A.2d 385 (App. Div. 1964).

The trial judge ruled that custom and practice and mutual understandings may create a property interest pursuant to *Perry v. Sinderman, supra* (Pet. App. 49a). The Collective Bargaining Agreement, which was submitted to the jury, provides that police officers retain all civil rights (Article IV); affords officers a "Bill of Rights" (Article XXXV); and establishes procedures for Discharge and Discipline (Article XXXVIII) which require at a minimum written notice of the charges and an opportunity to respond, and a meaningful hearing (Sections 3 and 8) (Pet. App. 80a, 111a-114a, 115a-116a; Pet. 5).

The jury heard testimony from which it concluded that Redfield was disciplined. Police Director Harrison conceded that Redfield was disciplined by the demotion, and Jersey City Police Chief John Fritz, whose deposition was read to the jury, said that whenever discharge or discipline is meted out, the department

must implement the terms of the Collective Bargaining Agreeme and the Jersey City Police Department rules and regulations (Pe App. 48a-53a).

Decisions of the federal courts regarding state law a generally accepted by this Court "unless their conclusions a shown to be unreasonable", *Poppe v. Clark*, 337 U.S. 472 486-87 (1948) (since determination of state law by court belc not unreasonable, it is accepted as correct for purposes of t case). *See MacGregor v. State Mut. Life Assur. Co.*, 315 U. 280, 281 (1942) (applicability of Michigan legislation regardi conduct of insurance business in Michigan):

> No decision of the Supreme Court of Michigan, or of any other Court of that state, construing the relevant Michigan law has been brought to our attention. In the absence of such guidance, we shall leave undisturbed the interpretation upon purely local law by a Michigan federal judge of long experience and by three circuit judges whose circuit includes Michigan.

The trial judge correctly applied state law to the case at b and no error has been shown.

5. *The Jersey City Police Department Collective Bargaini Agreement does not bar Section 1983 claims.* Petitioners arg that the Collective Bargaining Agreement excludes respondent right to bring a Section 1983 claim. This argument is flaw because it ignores N.J.S.A. 40A:14-147 and runs contrary to t decisions of this Court, *McDonald v. City of West Branch*, 4 U.S. 284, 289 (1984); *Patsy v. Bd. of Regents of the State Florida*, 457 U.S. 496 (1982) and of the Third Circuit, *Cheyn State College Faculty v. Hoffstedler*, 703 F.2d 732, 737 (3rd C

1985). *See also, Capua v. City of Plainfield,* 643 F. Supp. 1507 (D.N.J. 1986).

Mathews v. Eldridge, 424 U.S. 319 (1976) and *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 545 (1985) hold that before termination or disciplinary action, the aggrieved party must be given notice of charges, and explanation of the evidence and an opportunity to present his version.

The rules and regulations of the Jersey City Police Department and Collective Bargaining Agreement also require due process (Pet. 5; *see* Pet. App. 80a, 111a-116a).

Rule 723, Rules and Procedures, Jersey City Police Department, states:

> Any permanently employed officer or employee who receives a fixed annual salary from the municipality shall not, be suspended, removed, fined or reduced from office or employment therein except for just cause and then only after written charges and complaint shall have been preferred.

(Pet. 5).

The Collective Bargaining Agreement recognizes that police officers retain "all civil rights under New Jersey State Law and Federal Laws" (Article IV) (Pet. App. 80a).

The Collective Bargaining Agreement also states that "No Police Officer will be disciplined or discharged except for just cause" (Pet. App. 115a). Except for verbal (oral) warnings, all disciplinary actions are to be made in writing (Article XXXVIII,

Section 3) and there must be a formal hearing (Section 8) (Pet. App. 115a-116a).

Pre-deprivation hearings are the norm and only in extremely narrow situations can a hearing be postponed — and even then not eliminated — until after the deprivation has been effected. *Berlanti v. Bodman,* 780 F.2d 296, 301 (3rd Cir. 1985); *Stanna v. School District of Pittsburgh,* 775 F.2d 122 (3rd Cir. 1985); *Aiello v. City of Wilmington, Delaware,* 426 F. Supp. 1272, 1286 (D. Del. 1976); *see also, Perrapato v. Rose,* 83 N.J. Super. 245, 199 A.2d 385 (App. Div. 1964); *D'Ippolito v. McGuire,* 33 N.J. Super. 477, 483-85, 111 A.2d 568 (App. Div. 1955).

There was no obligation under the law for respondent to have exhausted administrative remedies. *See McDonald v. City of West Branch,* 466 U.S. 284 (1984). Writing for the Court, Justice Brennan reasoned as follows:

> The union's interests and those of the individual employee are not always identical or even compatible. As a result the union may present the employee's grievance less vigorously, or make different strategic choices, than would the employee."

Id. 466 U.S. at 291.

It was never the intention of Congress that arbitrations or administrative process would provide an adequate substitute for judicial proceedings in adjudicating claims under Section 1983. *McDonald v. City of West Branch, supra,* 466 U.S. at 289.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A — EXCERPTS OF JURY INSTRUCTION TRANSCRIPT (8T14-7 to 8T15-14)

[14] Now, what I would like to take up with you, are the specific claims in this case. But first, I am going to give you an overview of the case and the issues that you would have to decide.

The issues in this case, in fact, are fairly simple. Although no one suggests to you what its resolution will be.

In essence, the Plaintiff claims that he was promoted to detective from patrolman. That the detective department is a separate rank or position, requiring a hearing, before he could be demoted or disciplined.

The Defendant, on the other hand, contends that the detective department is not a separate rank or position. That the Plaintiff was subject to reassignment as a patrolman at anytime, without the necessity of giving him a hearing. That is basically the issue in this case. So you will have to decide first, that issue.

[15] Then you will have to decide whether or not the action taken by the City, against the Plaintiff, constituted discipline of him and whether under all of the circumstances, he was or was not ever entitled to a hearing.

Finally, if you decide he was entitled to a hearing and there is no suggestion that he received one, whether denial caused him damage and if so, what those damages are.

So, basically, those are the issues that you will have to decide. But, I will now go into much greater detail, so you will have a better understanding of what the law is and specifically how you should go about deciding this issue.

APPENDIX B — INTERNAL OPERATING PROCEDURES FOR THE THIRD CIRCUIT

CHAPTER 6. JUDGMENT ORDERS

6.1 Panel Unanimity.

A case may be terminated in this court by a judgment order upon the unanimous decision of the panel.

6.2 Criteria.

6.2.1 A judgment order is filed when the panel unanimously determines to affirm the judgment or order of the district court or decision of the Tax Court, enforce or deny review of a decision or order of an administrative agency, or dismiss the appeal or petition for review for lack of jurisdiction or otherwise, and determines that a written opinion will have no precedential or institutional value.

6.2.2 A judgment order may be used when:

(a) The judgment of the district court is based on findings of fact which are not clearly erroneous;

(b) Sufficient evidence supports a jury verdict;

(c) Substantial evidence on the record as a whole supports a decision or order of an administrative agency;

Appendix B

(d) No error of law appears;

(e) The district court did not abuse its discretion on matters addressed thereto; or

(f) The court has no jurisdiction.

APPENDIX C — EXCERPTS OF JURY INSTRUCTION TRANSCRIPT (8T22-2 TO 8T23-1)

[22] * * *

Plaintiff contends that the mutually explicit procedures in this case, was that Plaintiff was a permanent police officer promoted to the rank and position of detective. And as such, he enjoyed a property interest in that rank or position and that the Defendant deprived him of that interest, without due process of law.

Defendant, on the other hand, denies that the employment of a detective is a separate rank or position, or that any permanency is attached to the designation of Plaintiff as a detective, and would not be entitled to the charges and a hearing, and merely reassigned from detective to patrolman.

Plaintiff contends essentially, that the acts of October 11th, 1984, effective October 9th, 1984, and the act of demotion by Director Harrison of October 9, 1984, demoting or reassigning, as you find it, from detective to patrolman, was a disciplinary action which stemmed from the incident at Fox's Disco, October 7, 1984 and Plaintiff was demoted by such disciplinary action to be the faulty party in the eyes of the police, and the City, and his fellow officers.

APPENDIX D — EXCERPTS OF JURY INSTRUCTION TRANSCRIPT (8T29-11 TO 23)

[29] * * *

If you find that Plaintiff does have a property interest in being a detective and also that he was entitled to and denied a hearing and if you also find that even if he had been given a due process hearing, he still would have been a patrolman and made a patrolman, then you should consider that conclusion in determining the amount of damages. Because under the circumstances, only those damages would be awarded. In other words, if you find that he should have been given a hearing, but had he been given a hearing, the result would have been the same, he would only be entitled to nominal damages.

* * *

APPENDIX E — EXCERPTS OF CHARGE CONFERENCE TRANSCRIPT (7T160-23 TO 7T164-9)

[160] * * *

MR. PACHMAN: Am I to understand it is the position of the Court today that the state of the law or the state of the situation is different than when the Court [161] rendered its opinion on January of '89?

MR. SHULMAN: No, the Court never did it.

THE COURT: I never said this provision was not applicable to this case.

MR. SHULMAN: Never.

MR. PACHMAN: What you said was — that was one of the cases, one of the statutes that was under review back then, and we can dig out the briefs if we need to, and you say, It is clear, and indeed undisputed, plaintiff is not a quote, permanent employee as detective under state law. State law does not now recognize such a position, and accordingly plaintiff has not qualified for it by virtue of existing state law.

THE COURT: That is right. But if the jury finds that this is a promotion and a separate office, then of course, do you not agree that this provision would then be applicable?

MR. PACHMAN: Not in the promotion or office were not one to which the employee were permanently appointed which is the language of the statute.

THE COURT: All right.

MR. SHULMAN: I don't think they have to go that far because they can construe it if they feel he has a position of a police officer, he cannot be disciplined without just cause. I stressed that in my closing argument [162] and I think that that is very elementary, because they don't even have to, if they don't want to, even reach the determination if there was, quote, a promotion, unquote.

They can merely say he had position of detective, position of a police officer. He was disciplined without just cause. And that is what the law will entitle them to consider, and this is very appropriate. Because even under all of the United States Supreme Court cases, they say you have to look at state law, and you are basically saying do you consider this applicable or not. That is what a jury instruction is. I don't see how you can deny it.

MR. PACHMAN: Perhaps I misunderstood because of my late entry into the case, but I attempted to read the file very carefully, and it was my understanding based upon the Court's January ruling that I already referred to, January of '89 ruling that this Court as a matter of law had determined that there is no permanency attached to the position of detective.

THE COURT: Under state law.

MR. PACHMAN: Under state law.

MR. SHULMAN: Under civil service.

MR. PACHMAN: No.

MR. SHULMAN: The Supreme Court in the Falcone case said exactly the opposite. They went so far as to reaffirm the

Parapeto case, and they said that the rank or [163] position is distinct from that of a patrolman.

MR. PACHMAN: That is not whether or not you are permanent.

MR. SHULMAN: That is they can consider that one way or the other way.

MR. PACHMAN: No. The Court decided as a matter of law in this case just as in the Babula case, that since civil service does not give a test, and the only way you can be permanent under state law is to have taken a civil service test, that you are not permanent in the position under state law.

MR. SHULMAN: For the civil service.

MR. PACHMAN: No, state law purposes.

MR. SHULMAN: The Parapeto case says Title 40A is to be read —

MR. PACHMAN: But —

THE COURT: Gentlemen, please.

I am going to charge to the jury that if you find that plaintiff was promoted to the rank or position of detective, then you may consider the state law which provides —

MR. PACHMAN: Well, I respectfully, your Honor, want the record to know note I object to it.

Appendix E

THE COURT: I understand, but I think that is appropriate. Just so there is no question about what the [164] Court's view was, the Court found that under civil service there was no position as detective. We have a fact issue now as to whether under the actions taken by Jersey City, they recognized that detective was a separate rank or position, and if they do, then they have a right to consider the state law as to what procedures had to be followed in order to remove him from that position, and this statute is some evidence of that, and so I am going to charge that over the defendant's objection.

APPENDIX F — EXCERPTS OF CHARGE CONFERENCE TRANSCRIPT (7T166-22 TO 7T167-9)

[166] THE COURT: Wait a minute.

The language reads: "It is clear that under the law, a course of dealing may result in an implied contract. The course of dealing would include the length of service, [167] whether there was an increase in salary, and whether there were other indicia of the rank and position which gives rise to the expectation that said rank or position would continue."

MR. PACHMAN: That is all I am saying.

MR. SHULMAN: Fine. Fine.

MR. PACHMAN: That was the thought that I had, because the sentence simply didn't make sense in English.

THE COURT: That makes perfectly good sense.

APPENDIX G — NOTICE OF APPEAL FILED DECEMBER 10, 1990

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

DOCKET #86-3869 (H.L.S.)

Civil Action

MICHAEL J. REDFIELD,

Plaintiff-Respondent

vs.

CITY OF JERSEY CITY,

Defendant-Appellant

NOTICE OF APPEAL

Notice is hereby given that the City of Jersey City, Defendant above named, hereby appeals to the United States Court of Appeals for the Third Circuit from the Order and Judgment entered in this action by the Honorable H. Lee Sarokin, U.S.D.J., on the 13th day of November 1990, and from the Order of Honorable H. Lee Sarokin, U.S.D.J., denying Defendant's

Appendix G

Motion for a Judgment Notwithstanding the Verdict, entered on the 3rd day of December 1990.

s/ Martin R. Pachman
MARTIN R. PACHMAN,
ESQUIRE